

MEMORANDUM

To: Snohomish County Council

From: Yorik Stevens-Wajda, Legislative Analyst

Date: October 2, 2018

Re: Appeal of Hearing Examiner's August 3, 2018, Amended Decision Denying Extension and Denying Applications without Environmental Impact Statement, Nos. 11-01457 LU/VAR, 11-101461 SM, 11-101464 RC, 11-101008 LDA, 11-101007 SP
Appellant/Applicant: BSRE Point Wells, LP

This is a closed record appeal hearing held by the County Council (Council) under the provisions of [Chapter 30.72](#) of the Snohomish County Code (SCC). The record is limited to that which was before the Hearing Examiner and written argument timely filed with the Council.

Issues on appeal are limited to those raised by the appellant, BSRE Point Wells, LP (BSRE), that are within the jurisdiction of the Council. At the hearing, the Council will take oral argument pertaining to the existing record. No new testimony will be taken and no new exhibits will be accepted unless specifically requested by the Council.

Appeal to the Council is appropriate under SCC 30.72.070 and the Council has jurisdiction over this closed record appeal, except to the extent BSRE appeals "shoreline substantial development permits and permit rescissions, shoreline conditional use permits, and shoreline variances," which must be appealed to the state shoreline hearings board under SCC 30.44.250, not to the Council as a closed record appeal. See SCC 30.72.070(1).

The Proposal:

In 2011, BSRE submitted a series of permit applications (Application File Nos. 11-01457 LU/VAR, 11-101461 SM, 11-101464 RC, 11-101008 LDA, 11-101007 SP) related to an urban center development at Point Wells. Challenges to the validity of the county's urban center comprehensive plan land use designation and regulations that the project was vested to resulted in a period of litigation from 2011 to mid-2013. Since that time, the applicant BSRE has proceeded with different aspects of design and planning for the development, including several rounds of county review. The project was also granted three administrative extensions of the deadline for expiration of the applications totaling 3.5 years.

On January 9, 2018, Snohomish County Planning and Development Services (PDS) advised BSRE that it was proceeding with a review of application materials submitted as of that date. On January 12, 2018, BSRE requested a fourth extension of the June 30, 2018, application expiration date, which was denied by PDS on January 24, 2018.

Planning and Development Services (PDS) Recommendation (Exhibits N.1 and N.2)

On April 17, 2018, PDS issued a staff recommendation (Exhibit N.1) to the Hearing Examiner, recommending denial of the Urban Center Site Plan and associated permits, without completing

an Environmental Impact Statement, pursuant to SCC 30.61.220. The recommendation was based on a finding that the project applications substantially conflict with the county's development regulations and other applicable laws and regulations, citing eight major areas of conflict.

In response to new information provided by BSRE after the PDS staff recommendation, PDS provided a supplemental staff recommendation (Exhibit N.2) to the Hearing Examiner, continuing to recommend denial without an Environmental Impact Statement. PDS stated that it would not continue to rely on three of the previously cited major areas of conflict for its recommendation, but that the other five remain in substantial conflict, and the overall recommendation stands.

Hearing Examiner's June 29, 2018 Decision (Exhibit R.2):

The Hearing Examiner issued a Decision Denying Extension and Denying Applications Without Environmental Impact Statement on June 29, 2018. After reconsideration, the decision was replaced by an amended Hearing Examiner decision (see below).

BSRE's Petition for Reconsideration (Exhibit R.1):

On July 9, 2018, BSRE filed a petition for reconsideration of the Hearing Examiner's Decision, requesting that the Hearing Examiner reconsider its denial of BSRE's applications without an environmental impact statement, its decision to deny BSRE's request for an extension, its statement that an appeal should be filed with the Snohomish County Superior Court, and related findings of fact, conclusions of law, or rulings. The petition also requested clarification that the decision was without prejudice.

The request was based on arguments that the Hearing Examiner committed errors of law, that the Examiner's findings and conclusions are not supported by the record, that new and material evidence was discovered which could not reasonably have been produced at the open record hearing, and that BSRE had proposed changes to the application in response to deficiencies identified in the June 29 decision.

Hearing Examiner's August 3, 2018 Amended Decision (Exhibit R.4):

The Hearing Examiner granted in part and denied in part BSRE's Motion for Reconsideration and Clarification (see Exhibit R.3). The Hearing Examiner granted clarification that that appeal to the Council may be filed by an aggrieved party of record in accordance with chapter 30.72 SCC and that BSRE's applications are denied without prejudice under SCC 30.72.060(3), but denied reconsideration of the original June 29 decision. To reflect the clarifications above, the Hearing Examiner issued an Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement (Exhibit R.4) on August 3, 2018.

Appeal (Exhibit S.1):

BSRE filed an appeal (Exhibit S.1) of the Hearing Examiner's August 3, 2018 Amended Decision on August 17, 2018.

Requirements for filing a Type 2 appeal are set out in [SCC 30.72.080](#):

30.72.080 Requirements for filing a Type 2 appeal.

- (1) An appeal must be in writing and contain the following:
 - (a) A detailed statement of the grounds for appeal and the facts upon which the appeal is based, including references to specific hearing examiner findings or conclusions, and to exhibits or oral testimony in the record;
 - (b) Argument in support of the appeal; and
 - (c) The name, mailing address, and daytime telephone number of each appellant, or each appellant's representative, together with the signature of at least one of the appellants or of the appellants' representative.
- (2) The grounds for filing an appeal shall be limited to the following:
 - (a) The decision exceeded the hearing examiner's jurisdiction;
 - (b) The hearing examiner failed to follow the applicable procedure in reaching the decision;
 - (c) The hearing examiner committed an error of law; or
 - (d) The hearing examiner's findings, conclusions, and/or conditions are not supported by substantial evidence in the record.

Appellant BSRE alleges the following grounds for appeal of the Amended Decision, summarized, paraphrased, and numbered below for ease of reference:

Application of Residential Setbacks (see pages 6-7 of Ex. S.1)

1. The Hearing Examiner committed an error of law in applying SCC [30.34A.040](#)(2), which limits building heights adjacent to certain residential zones, to this project.
2. The Hearing Examiner failed to follow applicable procedures by ignoring project changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding residential setbacks.

Delineation of Ordinary High Water Mark (see pages 8-11 of Ex. S.1)

3. The Hearing Examiner committed an error of law and issued findings and conclusions not supported by the record with respect to BSRE's lack of diligence in delineating the Ordinary High Water Mark under SCC [30.62A.320](#).
4. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding the delineation of Ordinary High Water Mark.

Innovative Development Design (see pages 11-13 of Ex. S.1)

5. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding the use of innovative development design to protect critical area functions and values (see SCC [30.62A.350](#)).

High Capacity Transit, Additional Building Height (see pages 13-19 of Ex. S.1)

6. The Hearing Examiner committed an error of law by concluding that additional building height and development capacity permitted through proximity to high capacity transit pursuant SCC 30.34A.040 [2010] does not apply to this project.
7. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding a lack of commitment by Sound Transit or Community Transit to provide passenger rail or bus rapid transit service to the project site.
8. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding the potential for passenger ferry (aka water taxi) service to the project site.
9. The Hearing Examiner committed an error of law by concluding that the application did not document the necessity or desirability of additional height and development capacity permitted through proximity to high capacity transit pursuant SCC 30.34A.040 [2010].

Landslide Deviation Requests (see pages 20-23 of Ex. S.1)

10. The Hearing Examiner committed an error of law by finding substantial conflict with county code regarding landslide hazards (SCC 30.62B) while a landslide deviation request was pending.
11. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding landslide hazards.
12. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding landslide hazards.

Application Expiration Deadline Extension (see pages 23-27 of Ex. S.1)

13. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding whether BSRE should be granted an extension of the application expiration deadline.
14. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding extension of the application expiration deadline.

Ability to Refile and Reactivate Application under Former SCC 30.34A.180(2)(f) [2007] (see pages 27-30 of Ex. S.1)

15. The Hearing Examiner committed an error of law with respect to whether BSRE is entitled to refile its application pursuant to 30.34A.180(2)(f) [2007].

Inclusion of Short Plan Application in the Denial (see page 30 of Ex. S.1)

16. The Hearing Examiner committed an error of law by including BSRE's short plat application (No. 11-101007 SP) in the denial of applications in the Amended Decision.

Responses and Rebuttals

The Council received the following written arguments from BSRE and Parties of Record.

- BSRE's Supplemental Written Argument (Ex. S.5)
- Written argument from Parties of Record (Exs. S.2, S.3, S.4)
- BSRE's Rebuttal Argument (Ex. S.6)

Decision Options

At the conclusion of this closed record public hearing, the Council may adopt any or all of the findings and conclusions of the Hearing Examiner which support the Council's decision, and/or may adopt additional findings and conclusions supporting its decision. The Council may

- (1) affirm the Hearing Examiner's decision;
- (2) reverse the Hearing Examiner's decision either in whole or in part; or
- (3) remand the matter to the Hearing Examiner for further proceedings in accordance with the Council's findings and conclusions.

The council must issue a written decision within 60 days of the last day of the appeal period and within 15 days of the council's hearing, unless the applicant agrees to an extension. In this case the Council's written decision should be issued no later than October 16, 2018.

cc: Alethea Hart, Deputy Prosecuting Attorney